

Profound issues in Seattle lawsuit State high court set to rule on gay rights

- Wyatt Buchanan, Chronicle Staff Writer
Tuesday, January 3, 2006

When San Francisco Mayor Gavin Newsom ordered city officials to marry same-sex couples -- a defiant act two years ago that soon was emulated in Portland, Ore., and New Paltz, N.Y. -- gay rights supporters in Seattle demanded that their elected officials do the same.

Instead, King County Executive Ron Sims placed an unusual phone call.

"He said, 'I don't want to break the law. Will you please sue me to strike down the law?' " said Lisa M. Stone, executive director of the Northwest Women's Law Center. "That's not a call we get very often."

The Washington State Supreme Court is expected to rule any day in the case that resulted and a second, related lawsuit. Not since the state Supreme Court in Massachusetts in 2003 ordered that state's legislature to legalize same-sex marriage has a gay marriage case drawn as much attention. Legal experts say the rulings may serve as a gauge of the national mood and could prompt another battle in Congress over a federal marriage amendment.

"We're watching this case very closely," said Tom McClusky, director of government affairs for the Family Research Council, the conservative Washington, D.C., lobbying organization leading the effort for a constitutional ban on same-sex marriage.

"We've been pushing Congress even before the Washington state ruling just in anticipation because we see this as a matter of utmost importance," he said.

The two Washington state cases explore two major issues being debated across the nation: whether marriage is a right and how the government can allow straight people to marry but not gays or lesbians.

"The cases present constitutional issues that judges haven't thought about a great deal yet," said Matt Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project. "It's not just the narrow issue of marriage but how you think about laws that discriminate against gay people under the equal protection clause, how you think about what a fundamental right is.

"Whenever there's a situation like that," Coles added, "I think it's very hard to be sure how (judges) are going to go."

California case

In the same-sex marriage cases moving toward California's Supreme Court, a San Francisco trial judge ruled that denying marriage to gays and lesbians is discriminatory because the state recognizes a fundamental right to marriage.

Court challenges to state laws banning same-sex marriage also are under way in New York, New Jersey, Connecticut, Maryland, Florida and -- most recently -- Iowa.

Thirty-nine states in all bar same-sex marriage, 18 have enacted constitutional bans and in some states both laws and the constitution bar same-sex marriage.

A proposal to put a ban on California's June ballot failed last week when supporters did not gather enough signatures before the deadline; now they are looking toward 2008.

Voters in four other states will decide on bans this year, and the issue could crop up on ballots in some form in an additional five states.

In ruling on the constitutionality of barring same-sex marriage, the Washington court has three main options. It could uphold the law, it could approve the request to overturn it and order state officials to authorize the unions or it could declare the law unconstitutional and order the state legislature to resolve the matter.

Each of the three major recent state court rulings on the issue followed one of those options. Indiana courts denied a request to overturn a same-sex marriage ban. The top court in Massachusetts ordered the state's legislature to legalize same-sex marriage. And Vermont's high court allowed that state's legislature to enact civil unions.

"Wherever Washington goes, that's going to be tipping the balance a little bit," Coles said. "If it goes to marriage, that's the direction people will be going in. If it goes to civil unions, that may be showing society is being more cautious."

Because the Washington cases challenge only state law, they cannot be appealed to the U.S. Supreme Court.

And that is the plan. Gay rights organizations fear that raising the same-sex marriage issue in federal court without first building a foundation in state court case law will be counterproductive.

'Legal building blocks'

"The lawsuits we have done that have succeeded have been carefully planned and brought in states where we already had the legal building blocks by doing work on other issues," said Jennifer C. Pizer, senior counsel for the Lambda Legal Defense and Education Fund's western region and a co-counsel on one of the Washington state cases.

Pizer, who has worked on many high-profile gay rights cases in California, said gay rights organizations also are waiting for state legislatures to shore up the foundation with bills like Connecticut's civil union law and the same-sex marriage act California's legislature passed this summer, which Gov. Arnold Schwarzenegger vetoed.

One reason the Washington cases are getting so much attention is that, unlike Massachusetts, Washington allows nonresidents to obtain marriage licenses.

If Washington's law changed, a same-sex couple from any state could travel there, be legally married and return home and demand recognition for their marriage. And that would lead almost automatically to a challenge of the 1996 federal law that allows states to ignore same-sex marriages from other states or countries and that defines marriage as between a man and a woman.

Pizer noted that although same-sex couples already are marrying in Canada and other countries, no rash of federal challenges has resulted.

"There is widespread and accurate recognition that that is not a wise thing to do at this time," Pizer said.

Andrew Koppelman, a Northwestern University professor of law and political science who studies discrimination against gays and lesbians, said any ruling against state bans on gay marriage probably will reverberate nationally, however.

"I would expect a powerful reaction against the decision," Koppelman said.

McClusky of the Family Research Council said a ruling in favor of same-sex unions "would be part of a wake-up call."

"If the Washington state ruling comes down allowing it, we'll call on Congress for another vote on the amendment," McClusky said.